

1990

# The State of Utah v. Mark Raymond Dastrup : Brief of Appellant

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Judith S. H. Atherton; Assitant Attorney General; Attorneys for Appellee.

Shelden R. Carter; Harris, Carter and Harrison; Attorney for Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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UTAH COURT OF APPEALS  
STATE OF UTAH

STATE OF UTAH, )  
 )  
Respondent/Plaintiff, )  
 )  
vs. )  
 )  
MARK RAYMOND DASTRUP, ) Case No. 900144-CA  
 )  
Appellant/Defendant. )  
--oooOooo--

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appeal from a judgment and conviction for ten counts of forgery, all second degree felonies; seven counts of theft, all second degree felonies; and one theft, a third degree felony. Proceedings were held in the Sixth Judicial District Court in and for Sevier County, State of Utah. The Honorable Don V. Tibbs, presiding.

SHELDEN R CARTER  
HARRIS, CARTER & HARRISON  
Attorneys for Appellant  
3325 N. University Ave., Ste. 200  
Jamestown Square, Clocktower Bldg.  
Provo, UT 84604  
Telephone: 375-9801

Paul Van Dam  
Attorney General  
Attorney for Respondent  
236 North State  
State Capitol Building  
Salt Lake City, UT 84114

Priority Number 2

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COURT OF APPEALS

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### JURISDICTIONAL STATEMENT

Authority for this appeal is found within the confines of Section 77-35-26 of the Utah Rules of Criminal Procedure; Utah State Constitution Article I, Section 77-1-6(g); and Section 78-2a-3 Utah Code Annotated, and the rules of the Utah Court of Appeals.

### STATEMENT OF ISSUES

The defendant, Mark Raymond Dastrup, appeared before the District Court for Sevier County, State of Utah, on February 7, 1990. At that time argument was heard regarding the matter of the defendant's motion to withdraw his plea of guilty. Said motion was denied by the trial court.

The defendant has filed an appeal upon said denial of the motion to withdraw plea.

Defendant submits the following issue for determination:

The Court failed at the defendant's arraignment to determine whether the plea was voluntarily made; whether the defendant entering his plea acknowledged the waiver of all constitutional rights as set out by Rules of Criminal Procedure Rule 11(e)(3); and whether the defendant understood the nature and elements of the offense of which he was entering a plea; or that the plea was an admission of those elements. Rule 11(e) Utah Rules of Criminal Procedure.

## **Text of Statutes**

### Utah Code Annotated 77-35-11(5)

The court may refuse to accept a plea of guilty or no contest, and may not accept a plea until the court has found . . . (b) the plea is voluntarily made; (c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights; (d) the defendant understands the nature and elements of the offense to which he is entering a plea; that upon the trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all of those elements.

STATE OF UTAH,  
Respondent/Plaintiff,  
vs.  
MARK RAYMOND DASTRUP,  
Appellant/Defendant.

## STATEMENT OF THE CASE

Appeal from a judgment and conviction for ten counts of forgery, all second degree felonies; seven counts of theft, all second degree felonies; and one theft, a third degree felony. Proceedings were held in the Sixth Judicial District Court in and for Sevier County, State of Utah, in Richfield, Utah. The Honorable Don V. Tibbs, presiding.

On March 8, 1989, the defendant appeared before the court and entered a plea to 18 separate accounts of an Information alleging numerous counts of forgery or theft. On September 7, 1989, the defendant appeared before the court for the purposes of sentencing. Pursuant thereto, the court committed the defendant to the Utah State Prison in execution



of the sentence in reference to the matter of Count 1 and Counts 3 through 18. The order provided that the defendant would serve a term not less than 1 nor more than 15 years. As to Count 2, theft, a felony in the second degree, the defendant was ordered to serve a term not to exceed 5 years.

On July 26, 1989, the defendant, pro se, motioned the court to withdraw said plea of guilty.

The defendant asserted at said motion that (1) the defendant was not provided adequate representation of counsel; and (2) the defendant was denied equal protection under the laws of the State of Utah and also in violation of the United States Constitution. Subsequent thereto, with benefit of counsel, the defendant asserted that the taking the plea in March, 1989, was insufficient and not in compliance with Rule 11(e) of the Utah Rules of Criminal Procedure.

On February 7, 1990, the defendant appeared before the court and arguments were heard regarding the motion to withdraw said plea.

The District Court denied said motion at said hearing. From this denial, the defendant seeks appeal.

On appeal, the defendant asserts the following: The arraignment of the defendant and his entry of plea was not in

compliance with Rule 11(e) of the Utah Rules of Criminal Procedure.

At the time of his arraignment, defendant was advised by the Court accordingly:

You have certain constitutional rights in this court. First, you are entitled to be represented by an attorney at every stage in the proceedings, and you are represented by Mr. Hunt at this time.

You are entitled to a speedy trial by an impartial jury. You are entitled to confront and have your attorney cross-examine in open court any witnesses that appear against you. You have a privilege against compulsory self-incrimination. That means that you don't have to testify if you don't desire to. You may stand moot and say nothing and the burden is still upon the State of Utah to prove you guilty, beyond a reasonable doubt. Likewise, if you desire to testify, you have that right.

You have the right to compulsory process for obtaining witnesses in your defense. At the time of trial, it requires a unanimous verdict by the jury to convict you, and if you are convicted, you have the right to appeal the conviction to the Court of Appeals of the State of Utah.

Now there are basically your constitutional rights. Mr. Hunt, have you advised him of these rights?

Mr. Hunt: I have your Honor.

The Court: In your opinion does he understand them:

Answer: I believe so.

The Court: Do you have any questions you would like to ask me Mr. Dastrup?

Mr. Dastrup: No I don't believe so.

The Court: Now, I am interested only in a voluntary plea Mr. Dastrup. Has anyone made any promise to you or threats against you for the purpose of obtaining a plea, one way or the other, in this matter?

Mr. Brown: This is a negotiated plea, your Honor.

The Court: All right. Then I would like to know what the plea bargain is and Mr. Dastrup you listen to this very carefully please.

(Whereupon the prosecution outlined the plea agreement with the court with Mr. Hunt's participation.)

The Court: And I would insist it likewise be executed in open court and that you initial each one of the paragraphs involved. I assume your attorney has advised you of that, Mr. Dastrup.

Mr. Dastrup: Yes sir.

The Court: Now you want me to accept this plea bargain then at this time, Mr. Dastrup?

Mr. Dastrup: Yes sir.

The record is absent regarding any comments made by the defendant that the plea was voluntarily made as provided in Utah Rules of Criminal Procedure, Utah Code Annotated 77-35-11(5)(b). Further, the record is absent that by entering the plea the defendant waived all the constitutional rights as set out by Utah Code Annotated 77-35-11(5)(c) and that the defendant understood the nature and elements of the offense

of which he was charged. Utah Code Annotated 77-35-11(5)(d). Further, the record is absent regarding the plea being an admission of those elements. See Utah Code Annoated 77-35-11(5)(d).

#### SUMMARY OF THE ARGUMENT

Utah Code Annoated 77-35-11(5) states as follows:

The court may refuse to accept a plea of guilty or no contest, and may not accept a plea until the court has found . . . (b) the plea is voluntarily made; (c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights; (d) the defendant understands the nature and elements of the offense to which he is entering the plea; that upon the trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all of those elements.

(It should be noted that Rule 11 has been modified and repealed effective July 1, 1990. However, the arraignment of the defendant occurred in March, 1989, and all motions and arguments were all made and heard prior to July, 1990. The previous Rule 11 (Utah Code Annotated Section 77-35-11) has been readopted with few modifications.)

The record is absent regarding any comments by the defendant that the plea was voluntarily made; that by

entering the plea the defendant waived all of his constitutional rights; that the defendant understood the nature and elements of each of the offenses of which he was entering a plea; and that by entering a plea he was admitting said elements.

There are no further findings within the record at the time of arraignment, by the court. Particularly the court failed to find that the defendant's plea was voluntarily made; that by entering the plea he waived all of his constitutional rights; that the defendant understood the nature and elements of each of the offenses of which he was entering the plea; and by entering the plea he was admitting those elements.

Pursuant to said failure of the court to make said findings and inquire of the defendant as to each of those issues, the motion to withdraw said plea should have been granted.

#### ARGUMENT

The defendant appeared before the court and entered a plea to eighteen separate counts of the Information alleging either forgery or theft. On September 7, 1989, the defendant appeared before the court for purposes of sentencing. Pursuant thereto, the court committed the defendant to Utah State Prison in execution of the sentence in reference to the matter of Count 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,

15, 16, 17 and 18, the order provided that the defendant would serve a term of not less than one nor more than fifteen years. As to Count 2, theft, a felony in the third degree, the defendant was ordered to serve a term not to exceed five years.

The defendant asserts that the taking of the plea of March, 1989 was insufficient and not in compliance with Rule 11(e) of the Utah Rules of Criminal Procedure.

At the time of his arraignment, defendant was not properly advised by the Court of his constitutional and statutory rights and no findings were made by the court finding those to be waived.

The Utah Rules of Criminal Procedure treats the issue of entry of plea and provides as follows:

Utah Rules of Criminal Procedure, Rule 11(5)  
(U.C.A. 77-35-11(5)):

The Court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings: (1) that if the defendant is not represented by counsel, he has knowingly waived his right to counsel and does not desire counsel; (2) that the plea is voluntarily made; (3) that the defendant knows he has a right against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and by entering the plea he waives all of those rights; (4) that the defendant understands the nature and elements of the offense to which she is entering the plea; that upon the trial, the prosecution would have the

burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements; (5) the defendant knows the minimum and maximum sentence that may be opposed upon him for each offense to which a plea is entered, including the possibility of imposition of consecutive sentences; and (6) whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

At the time of arraignment on March 8, 1989, the defendant appeared before the court and entered his plea. The court advised him his right to counsel; right against compulsory self-incrimination; to a jury trial; to confront and cross-examine in open court the witnesses against him.

However, the record is absent regarding any comments by the defendant that the plea is voluntarily made as provided in Utah Rules of Criminal Procedure Rule 11(5)(b); and that by entering the plea he waived all the constitutional rights as set out by statute Rule 11(5)(c); and that the defendant understands the nature and elements of the offenses to which he is entering the plea; or that the plea is an admission of those elements. Rule 11(5)(d).

Under State v. Miller, the trial court did not have to make an absolute finding as to the defendant's acknowledgement of the certain rights. The Court held it sufficient if the "record as a whole" affirmatively established that the defendant entered his plea with full

knowledge and understanding of its consequences and the rights he was waiving. State v. Miller, 718 P.2d 403 (Utah 1986).

However, in State v. Gibbons, 740 P.2d 1309 (Utah 1987), the Utah Supreme Court effectively replaced the prior "record as a whole" test with a "strict Rule 11(e) compliance test" in accepting a defendant's guilty plea. In Gibbons the court remanded the defendant's appeal of his guilty plea as defendant had failed to first file a motion to withdraw the plea. However, the court took the opportunity to issue this statement of law.

The Gibbons court held:

Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered.

The court did further establish that trial courts may not rely on defense counsel or executed affidavits to satisfy the specific requirements of Rule 11(e). See also State v. Vasilacopulos, *infra*. The trial court must conduct an on-the-record review with the defendant of the Rule 11(e) requirement. See also State v. Vasilacopulos, 756 P.2d 92 (Utah App. 1988).



Consequently, the strict compliance rule of the Gibbons case would apply to the present proceeding. See Vasilacopulos.

Recently in State v. Pharris, 143 Utah Adv. Rpts. 35, (Utah Ct. App. Sept. 14, 1990), the defendant presented a similar issue to the Court of Appeals as presented here. In Pharris, the defendant was accused of stealing a VCR from a Sears store. The defendant appeared before the court and entered a guilty plea. There the Judge told the defendant he was entitled to certain constitutional protections including the right to trial by jury, the right to confront and cross-examine witnesses, the right to require the State to prove its case beyond a reasonable doubt, and "other valuable constitutional rights." Defendant said he understood his waiver of those rights by pleading guilty and was willing to do so.

Defendant asserted, on appeal, that the trial judge failed to comply with Rule 11 of the Utah Rules of Criminal Procedure as required by the Utah Supreme Court in State v. Gibbons, 740 P.2d 1309 (Utah 1987). Defendant contended that the trial court failed to inform the defendant of his right against self-incrimination; the nature and elements of the offense, and the possible penalties which might be imposed. The State on appeal argued that the court should abandon the

strict compliance standard under Gibbons and allow application of the prior "record as a whole" test.

The Court of Appeals found that the trial court failed to strictly comply with Rule 11 and Gibbons and thus vacated the defendant's conviction and remanded to the trial court with instructions to grant the defendant's motion to withdraw his guilty plea.

Both Gibbons and Pharris are almost identical to the present setting. The trial court failed to make findings and failed to interrogate the defendant as to whether the plea was voluntarily made (U.C.A. 77-35-11(5)(b)); whether the defendant understood that he waived all of the constitutional rights as granted him by the United States Constitution and the Constitution of the State of Utah (U.C.A. 77-35-11(5)(c)); whether the defendant understood the nature and elements of each of the offenses of which he was entering a plea (U.C.A. 77-35-11(5)(d)); and whether the defendant understood that by entering the plea of guilty he was admitting each of those elements (U.C.A. 77-35-77-5(d)).

Consequently, the strict compliance rule of Gibbons finds the advisement of rights pursuant to Rule 11(5) of the Utah Rules of Criminal Procedure inadequate in that they fail to provide that the plea was voluntarily made; that he recognized that the plea constituted a waiver of his


constitutional rights and the rights granted to him under Rule 11(5); that the defendant's understood the nature and elements of the offense to which he is entering the plea and that a plea is an admission of all those elements.

#### CONCLUSION

The defendant asserts that the taking of the plea was inadequate and the defendant was not fully advised in compliance with Rule 11(5) of the Utah Rules of Criminal Procedure and the holding of State v. Gibbons.

Consequently, the defendant's petition, request, or motion to withdraw his plea should be granted and the defendant should be released at this time pending further hearing.

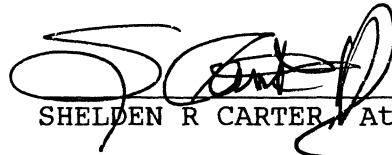
Respectfully submitted this 10 day of October, 1990.

  
\_\_\_\_\_  
SHELDEN R CARTER  
Attorney for Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 16 day of October, 1990, by first-class, U.S. Mail, postage prepaid to the following:

Mr. Paul Van Dam  
Attorney General  
Attorney for Respondent  
236 North State  
State Capitol Building  
Salt Lake City, UT 84114

  
SHELDEN R CARTER, Attorney

ADDENDUM

Pursuant to Rule 24(f) of the Rules of the Utah Rules of Appellate Procedure, defendant submits the following addendum:

Copy of the arraignment transcript in its pertinent portions.

1 A No.

2 Q Are you under the influence of alcohol or narcotics  
3 or suffering any mental illness?

4 A No.

5 Q At this time, Mr. Dastrup, I'll hand you a copy of  
6 the document entitled Amended Information and hand your  
7 Counsel a copy and I'll ask the Clerk to read the Amended  
8 Information.

9 [INFORMATION READ]

10 THE COURT: The record should indicate that the  
11 information has been read, with a copy delivered to the  
12 Defendant.

13 Now Mr. Dastrup, it's my duty to advise you of your  
14 constitutional rights, advise you of the consequence of the  
15 matter before the Court, make sure you understand them, and  
16 it's my duty to obtain a voluntary plea from you. So you  
17 listen to me carefully, and if you have any questions, don't  
18 hesitate to stop me and I'll answer them.

19 You're being charged with 18 different crimes.  
20 They're either forgery or theft. Forgery is a crime  
21 punishable--and this is count No. 1--is a crime and a felony  
22 in the second degree. A felony in the second degree,  
23 according to the laws of the State of Utah, is punishable by a  
24 term of not less than 1 nor more than 15 years in the Utah  
25 State Prison, or a fine up to \$10,000, or both fine and

1 imprisonment.

2           Count No. 2 is theft, a felony in the third degree.  
3 A felony in the third degree is punishable by a term not to  
4 exceed 5 years in the Utah State Prison, or a fine up to  
5 \$5,000, or both.

6           Count 3 is theft, a felony in the second degree,  
7 which is what I've indicated. Count 4 is theft, a felony in  
8 the second degree; Count 5 is theft, a felony in the second  
9 degree; Count 6 is theft, a felony in the second degree; Count  
10 7 is theft, a felony in the second degree; Count 8 is theft, a  
11 felony in the second degree; Count 9, is theft, a felony in  
12 the second degree; Count 10 is forgery, a felony in the second  
13 degree, and Count 11 is forgery, a felony in the second  
14 degree; Count 12 is forgery, a felony in the second degree;  
15 Count 13 is forgery, a felony in the second degree; Count 14,  
16 Count 15, Count 16, Count 17, and Count 18 are all forgery,  
17 felonies in the second degree.

18           Now, there being 18 different crimes, of course  
19 there's 18 different punishments and these punishments can  
20 either be consecutive or concurrent. That means they can  
21 either follow each other or they can be at the same time,  
22 depending upon the Court. So that's the consequence of the  
23 matter before the Court.

24           You have certain constitutional rights in this  
25 Court. First, you're entitled to be represented by an

1 Attorney at every step in the proceedings, and you're  
2 represented by Mr. Hunt at this time.

3           You're entitled to a speedy trial by a impartial  
4 Jury. You're entitled to confront and have your Attorney  
5 cross examine in open Court any witnesses that appear against  
6 you. You have a privilege against compulsory self  
7 incrimination. That means you don't have to testify, if you  
8 don't desire to. You may stand mute and say nothing and the  
9 burden's still upon the State of Utah to prove you guilty,  
10 beyond a reasonable doubt. Likewise, if you desire to  
11 testify, you have that right.

12           You have a right to compulsory process for obtaining  
13 witnesses in your defense. At the time of trial it requires a  
14 unanimous verdict by the Jury to convict you, and if you are  
15 convicted, you have the right to appeal the conviction to the  
16 Court of Appeals of the State of Utah.

17           Now there are basically your constitutional rights.  
18 Mr. Hunt, have you advised him of these rights?

19           MR. NUNT: I have, Your Honor.

20           THE COURT: In your opinion, does he understand  
21 them?

22           A I believe so.

23           THE COURT: Do you have any questions you'd like to  
24 ask me, Mr. Dastrup?

25           MR. DASTRUP: A No. I don't believe so.



1 THE COURT: Now, I'm interested only in a voluntary  
2 plea, Mr. Dastrup. Has anyone made any promises to you or  
3 threats against you for the purpose of obtaining a plea, one  
4 way or the other, in this matter?

5 MR. BROWN: This is a negotiated plea, Your Honor.

6 THE COURT: All right. Then I'd like to know what  
7 the plea bargain is, and Mr. Dastrup, you listen to this very  
8 carefully, please.

9 PLEA AGREEMENT

10 MR. BROWN: Your Honor, the initial information  
11 charged the Defendant with more than 100 counts, those counts  
12 being theft and forgery. Subsequent to the filing of the  
13 initial information, the State became aware of additional  
14 evidence with regard to additional felony counts of theft  
15 which could have been charged. I think it might help the  
16 Court to be enlightened a little bit as to the circumstances  
17 surrounding this incident.

18 The Defendant was employed as a bookkeeper for  
19 Peterson, the victim in this action. As the bookkeeper he is  
20 alleged by the State to have forged a certain number of checks  
21 and issued those checks to himself and that he was unentitled  
22 to the funds. In addition, there were various checks which  
23 were signed in blank by authorized parties of Peterson  
24 Distributing and then, as a bookkeeper, Mr. Dastrup would  
25 execute those checks to himself and misappropriate those

1 funds.

2           After conferring with Mr. Hunt on behalf of Mr.  
3 Dastrup, the State agreed to file the Amended Information  
4 before the Court. Those theft counts that are included in the  
5 information are an accumulation of the amounts, over six-month  
6 incremental periods, of all of the checks that we are now  
7 aware of that Mr. Dastrup misappropriated. However, we do  
8 have an on-going investigation and we will apprise the Court  
9 of any additional funds that we've located that have been  
10 taken by Mr. Dastrup.

11           The State has agreed to file the information before  
12 the Court, charges 18 counts in return for a plea of guilty by  
13 the Defendant. And also, our understanding is that we will  
14 present to the Court such additional amounts as we find during  
15 the on-going investigation and that those amounts will be  
16 included for purposes of restitution. That is the agreement.

17           THE COURT: So as I understand your agreement, he's  
18 to enter a plea of guilty for each one of these counts then.

19           MR. BROWN: That's correct, Your Honor.

20           THE COURT: Is that your agreement, Mr. Hunt?

21           MR. HUNT: Yes. Just to declare any additional  
22 amounts that are found would be just for the purpose of  
23 restitution. There would be no new charges filed on those.

24           THE COURT: Is that your agreement, Mr. Brown?

25           MR. BROWN: It is, Your Honor.

1 THE COURT: Now Mr. Dastrup, Counsel have indicated  
2 a plea bargain and the only way I'll accept this plea bargain  
3 is on the basis that you admit that you actually committed the  
4 forgeries and theft that you've been charged with and admit  
5 the allegations as set forth in the Amended Information on  
6 each of the particular facts. That's the only way I'll do it.  
7 I don't want somebody coming in and pleading in my Court to  
8 something that they didn't do. Do you understand that?

9 A Yes.

10 Q And likewise, I've instructed the State's Attorney  
11 in these kinds of cases I want the statement signed by the  
12 Defendant in writing, and a plea agreement. I assume you have  
13 that.

14 MR. BROWN: We do, Your Honor.

15 THE COURT: And I would insist that that likewise be  
16 executed in open Court and that you initial each one of the  
17 paragraphs involved. I assume your Attorney has advised you  
18 of that, Mr. Dastrup.

19 MR. DASTRUP: Yes, sir.

20 THE COURT: Now, you want me to accept this plea  
21 bargain then at this time, Mr. Dastrup?

22 A Yes, sir.

23 Q Now Mr. Dastrup, do you admit that you committed  
24 the forgeries, as set forth in the amended information, and  
25 committed the thefts on the dates, as set forth in the amended